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Federal Communications Commission
Washington, D.C. 20554

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In the Matter of)

FCC 94-119

Implementation of Section 19
of the Cable Television
Consumer Protection and
Competition Act of 1992)

CS Docket No. 94-48 ✓

Annual Assessment of the
Status of Competition in the
Market for the Delivery of
Video Programming)

NOTICE OF INQUIRY

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I. Introduction

1. On October 5, 1992, Congress enacted the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act" or "Act").¹ Section 19(g) of the 1992 Cable Act directs the Commission to "beginning not later than 18 months after promulgation of the regulations required by [Section 19(c) of the 1992 Cable Act], annually report to Congress on the status of competition in the market for the delivery of video programming."² Because the Commission adopted regulations implementing Section 19(c) on April 1, 1993, the first report must be submitted to Congress no later than October 1, 1994.³ Accordingly, we initiate this Notice of Inquiry ("NOI") to assist in gathering the information necessary to comply with this statutory requirement.

¹ Pub. L. No. 102-385, 106 Stat. (1992).

² Section 628(g) of the Communications Act of 1934, as amended (hereinafter, the "Communications Act"), 47 U.S.C. § 548(g).

³ See First Report and Order in Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, MM Docket No. 92-265 ("First R&O"), 8 FCC Rcd 3359 (1993), recon. pending.

2. As the Commission noted in the proceedings implementing the rate regulation requirements of the 1992 Cable Act, the Act generally provides that where competition is present, cable television rates shall not be subject to regulation by government, but shall be regulated by the market.⁴ Indeed, the Act contains a clear and explicit preference for competitive resolution of issues where that is feasible.⁵ However, where competition is absent, the Commission is to protect the interests of subscribers by ensuring that cable rates are reasonable. Thus, the provisions in the Act relating to rate regulation by the Commission and local franchising authorities are intended to provide a transitional mechanism until competition develops and consumers have adequate multichannel video programming alternatives.

3. In addition, Sections 12 and 19 of the Act are designed to foster the development of competition to cable operators by requiring that programming be made available to all multichannel video programming distributors on fair terms and conditions.⁶ These sections of the Act are aimed at ensuring that large cable operators do not, through anticompetitive means, limit the ability of unaffiliated video programming vendors to secure carriage on multichannel distribution systems. Promoting the emergence over time of effective competition by fostering the entry of alternative multichannel video programming distributors is a critical element of the regulatory framework mandated by Congress.

4. Because of the significance of the role of competition in the regulation of cable television service, this statutory reporting requirement imposes upon the Commission a responsibility to engage annually in a significant competitive analysis of the multichannel video programming market. This will enable Congress and the Commission to evaluate the effectiveness of, as well as the continued need for, the regulation of the cable industry required under the Act.

5. Thus, to comply with its statutory directive, the Commission must engage in an ongoing process of evaluating the status of competition to cable television. Accordingly, through this NOI we seek to gather the requisite information on the status of the competitive marketplace to prepare our first report

⁴ Report and Order and Further Notice of Proposed Rulemaking ("Rate Order"), MM Docket No. 92-266, 8 FCC Rcd 5631 (1993).

⁵ 1992 Cable Act § 623(a)(2), 47 U.S.C. § 543(a)(2) ("Preference for Competition").

⁶ 1992 Cable Act §§ 616, 628, 47 U.S.C. §§ 536, 548.

to Congress, and to develop a substantive framework and data reference point for future annual reports.

II. Purpose of the NOI

6. We intend to prepare a preliminary analysis of the development of competition to cable television by various emerging alternative technologies. We recognize, however, that our analysis will be limited primarily to information submitted by interested parties in response to this NOI, to publicly available materials, and to limited further information requests from certain parties, if needed. Therefore, this NOI also will seek comment on appropriate methods for obtaining the information and data required to prepare future, more comprehensive reports.

7. We also seek to examine the effect that the 1992 Cable Act and our implementing rules, and effect of the changes in the multichannel video marketplace resulting from the Act and rules, have had on the entry and development of competitors in the marketplace. Accordingly, we seek comment on specific conduct and practices relating to the negotiation, sales, marketing, and carriage practices of multichannel video programming distributors, as discussed further herein.

8. The goals of this NOI are threefold: (1) to gather information sufficient to prepare a preliminary analysis for Congress of the current state of competition to cable provided by alternative distribution technologies; (2) to collect information on whether and the extent to which the conduct and practices of multichannel video programming vendors and distributors have changed; and (3) to identify the information required to enable the Commission to prepare more comprehensive analyses in our future reports and the appropriate means of obtaining it.

9. Specifically, we seek to establish a reference point for future comparisons of the status of the multichannel video programming marketplace by updating the information contained in Appendix G of our 1990 Cable Report to Congress with respect to horizontal ownership levels and vertical integration.⁷ In addition, we seek to identify the appropriate means of analyzing the relevant programming and distribution markets, and to compile information that will be used to assess the status of effective competition in the market for the delivery of video programming.

10. We believe that the best approach for developing a complete record for such an analysis is to begin by soliciting

⁷ Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, MM Docket No. 89-600, 5 FCC Rcd 4962 (1990) ("1990 Report"); see ¶¶ 13-14, infra.

comment on the relevant analytical scope. Thus, through this NOI we also ask commenters to identify and define particular issues relevant to a comprehensive competitive analysis of the multichannel video programming marketplace. Additionally, we invite comment on relevant economic methodologies that may assist the Commission in its analysis of the extent of competition and market performance in both the markets for multichannel distribution systems and video programming. More specifically, the Commission invites comments on (1) the potential usefulness of standard structure-conduct-performance analyses and complementary antitrust concepts, including relevant market definitions and market power concepts⁸; (2) the potential relevance of contestable market theory and its emphasis on entry barriers, especially sunk costs, as applied to markets for multichannel video distribution systems⁹; (3) the potential usefulness of transaction cost economics and its emphasis on specific characteristics of a business transaction that may affect the sustainability of market exchange and provide incentives for vertical integrating¹⁰; and (4) other economic methodologies or principles that the Commission may find useful in its competitive analysis of both the multichannel distribution system and video programming markets. Comments on the potential usefulness of econometric studies of demand and cost are also invited.

11. We recognize that the outcomes of several other ongoing Commission proceedings could affect competition in the multichannel video programming marketplace.¹¹ We emphasize, however, that we do not intend to consolidate any issues that may be pending in those proceedings within this inquiry. Rather, we limit the scope of this proceeding to the three goals discussed.

12. Accordingly, we solicit comment on the appropriate

⁸ See, e.g., F. M. Scherer and David Ross, Industrial Market Structure and Economic Performance, 3d ed. (Boston: Houghton Mifflin, 1990), Chapter One.

⁹ See William J. Baumol, John C. Panzar, and Robert D. Willig, Contestable Markets and the Theory of Industry Structure (New York: Harcourt Brace Jovanovich, 1982).

¹⁰ See, e.g., Oliver E. Williamson, The Economic Institutions of Capitalism (New York: The Free Press, 1985).

¹¹ See, e.g., MM Docket No. 92-264 (re: ownership); MM Docket No. 92-265 (re: program access); MM Docket No. 93-8 (re: home shopping stations); MM Docket No. 93-21 (re: sports migration); MM Docket No. 93-25 (re: direct broadcast satellite); see also MM Docket No. 92-259 (re: must-carry/retransmission consent) and MM Docket No. 92-266 (re: rate regulation).

parameters and the specific types of information necessary to engage in our annual competitive analysis. In particular, when addressing proposals for the collection of specific information, we ask that commenters identify any resulting burdens as well as benefits to the public. Thus, we seek comment on the least intrusive means of gathering the necessary information without unduly burdening the information providers.

III. Fostering Competitive Technologies and Competition in the Market for the Delivery of Video Programming

13. The status of competition in the multichannel video programming marketplace has been a source of regulatory concern for some time. Section 623(h) of the Cable Communications Policy Act of 1984 ("1984 Cable Act") required the Commission to conduct a study of the cable industry's operations under the Communications Act. Based on that study, the Commission was directed to prepare and submit to Congress a report analyzing the effect on the multichannel video programming marketplace of substituting market forces for cable rate regulation.¹² The Commission released its Report on July 31, 1990.¹³

14. In the 1990 Report, the Commission concluded that the cable television industry had become increasingly concentrated and vertically integrated, thereby providing multiple system operators ("MSOs") and vertically integrated cable operators with the opportunity to pursue anticompetitive actions against programming services or competing multichannel providers. Further, the 1990 Report identified specific evidence of anticompetitive conduct.¹⁴

15. Thereafter, Congress enacted legislation to provide increased consumer protection and to foster the development of competition in cable television and related markets.¹⁵ As noted above, a primary goal of the 1992 Cable Act was to promote increased competition in the delivery of cable television services. As "effective competition" develops in individual markets, as that term is defined in the 1992 Cable Act and the

¹² Pub. L. No. 98-549, 98 Stat. 2780, codified in Title VI of the Communications Act of 1934, 47 U.S.C. §521 et seq., § 543(h) ("Communications Act").

¹³ See 1990 Report, supra.

¹⁴ Id. at 5006, 5008, and 5021.

¹⁵ See Preamble to 1992 Cable Act, p. 1.

Commission's Rules,¹⁶ the Commission can withdraw from the regulation of cable rates. To further this goal, it is necessary to gather information that can be used to identify the extent and growth of effective competition.

16. To gather information necessary for the report required by Section 19(g) of the 1992 Cable Act, we must define the proper focus for tracking the development of effective competition. In that regard, answers to the following questions would be helpful:

(a) Should the Commission examine competition specifically as it relates to cable, and thus define the relevant market for analysis as each existing cable franchise?

(b) Alternatively, should the Commission analyze competition in broader geographic areas, identifying the types of multichannel video programming distributors that serve particular areas and measuring the extent of their distribution and/or penetration?

(c) Are both methods appropriate?

Thus, we seek comment on how to define the relevant market for analysis (e.g., franchise by franchise, state by state, or by metropolitan statistical area), and whether we should examine more than one parameter.

17. As we gather information related to competition, we aim to track its growth and development over time in our annual reports to Congress. With sufficient information, we seek to develop a visual measure such as a color-coded map of the United States that can be updated to track the growth (or decline) of effective competition.

18. For purposes of our first annual report to Congress, however, we seek to make a preliminary assessment of the status of competition at the local level in the video programming marketplace. Competition to cable television is currently provided to a limited extent by "wireless cable" systems,¹⁷ high-power and medium-power direct broadcast satellite ("DBS") services,¹⁸ direct-to-home satellite services, satellite master

¹⁶ See 1992 Cable Act, Section 623(1), 47 U.S.C. § 543(1).

¹⁷ By "wireless cable," we mean multipoint distribution ("MDS"), multichannel multipoint distribution service ("MMDS"), and local multipoint distribution service ("LMDS").

¹⁸ For purposes of this NOI only, we group together both medium-power service, governed by Part 25 of the Commission's
(continued...)

antenna television ("SMATV") systems , telephone technologies (such as video dialtone), cable overbuilds, and over-the-air television broadcasting. Through this NOI, we seek to determine the status of video programming choices available to consumers in a particular location. In addition, commenters are invited to address technological advances that may have an impact on the market for the delivery of video programming.

A. Wireless Cable

1) Multipoint Multichannel Distribution Service (MMDS)

19. In the 1990 Report, we noted that there were 50 or more wireless cable systems serving approximately 300,000 subscribers across the country, with "numerous additional systems planned."¹⁹ The Wireless Cable Association estimates that there were approximately 500,000 wireless cable subscribers by the end of 1993.²⁰ The Commission, in the 1990 Report, identified two additional requirements essential to the continued and successful development of wireless cable as a competitive alternative to cable television systems. The first was to ensure access to programming by wireless operators on non-discriminatory terms and conditions. The second was to eliminate impediments imposed by local authorities, including attempts to impose franchising requirements on wireless operators, local land use restrictions on wireless cable reception and antennas, and local requirements limiting access to buildings.²¹

20. Since the 1990 Report, many regulatory changes have occurred, both legislatively and at the Commission. First, Congress enacted the program access provisions of the 1992 Cable Act. Issues related to changes that may have occurred in the market for distribution of video programming as a result of these

¹⁸(...continued)

rules concerning fixed satellite service ("FSS"), and high-power DBS, governed by Part 100 of the Commission's rules. See 47 C.F.R. §§ 25.101 et seq. and 100.1 et seq.

¹⁹ See 1990 Report at 5014.

²⁰ Andrew Kreig, "Wireless Cable '94 Service Predicted In 23 of 25 Top ADI TV Markets," Spectrum, at 1.

²¹ See 1990 Report at 5015-5016. With respect to local regulation of access to buildings, the 1990 Report noted that in thirteen states and the District of Columbia, "mandatory access" laws existed that required mandatory access to buildings for franchised cable operators, but generally not for other multichannel video providers.

provisions are addressed in Section V of this NOI.²² In addition, the Commission has recently determined that future MMDS license applications which are mutually exclusive will be subject to the competitive bidding process.²³

21. As for access to buildings by alternative programming distributors, the 1992 Cable Act's provisions with respect to home wiring were designed to allow subscribers to utilize the wiring inside their homes with an alternative multichannel video delivery system.²⁴ We seek comment on the adequacy of this legislative solution, and its current impact on the development and competitiveness of wireless cable systems. To the extent that access to buildings continues to pose an impediment to competition from wireless cable operators, we ask commenters to propose recommendations to Congress that could be included in our report.

22. Moreover, since the 1990 Report, the Commission has taken steps, independent of legislation, to improve the ability of wireless cable operators to provide viable competition to cable. In General Docket Nos. 90-113 and 90-54,²⁵ the Commission:

a) reduced the minimum programming requirements for new Instructional Television Fixed Service ("ITFS") licensees from 20 hours per channel per week to 12 hours per channel per week for the first two years of operation;²⁶

b) increased the maximum ITFS and MDS transmitter output so that signal strength would consistently reach 15 miles;²⁷

c) authorized the use of signal boosters so that operators could serve areas without line-of-sight to the

²² See ¶¶ 65-71, infra.

²³ Second Report and Order, PP Docket No. 92-253, (rel. April 20, 1994), at para. 62.

²⁴ See 1992 Cable Act, Section 16(d), 47 U.S.C. 544(i).

²⁵ See Private Operational-Fixed Microwave Service, Multipoint Distribution Service, Multichannel Multipoint Distribution Service, Instructional Television Fixed Service, and Cable Television Relay Service, 5 FCC Rcd 6410 (1990).

²⁶ Id. at 6416.

²⁷ Id. at 6418.

transmitter;²⁸

d) removed ownership restrictions so that a single operator may acquire a license for both groups of four MMDS channels and also may acquire more than one Operational Fixed Service ("OFS") channel in a single market;²⁹

e) eliminated time-of-day and day-of-week restrictions on ITFS programming requirements;³⁰

f) permitted wireless cable operators to use channel mapping technology, which allows the wireless operator to provide uninterrupted programming on the channels it leases from ITFS licensees while also permitting the ITFS licensees to fulfill their per channel per week programming requirements;³¹ and

g) adopted rules aimed at reducing the incentive for "application mills" to flood the Commission with MMDS applications.³²

23. Moreover, the Commission has issued a Notice of Proposed Rule Making on whether ITFS licensees should be permitted to load all of their required programming on one of the four ITFS channels, in place of the per channel programming requirements now in place.³³ Finally, the Commission is considering adopting rules which would create a "window," which would limit the filing period for ITFS applications.³⁴

²⁸ Id. at 6422-23.

²⁹ Id. at 6411-12.

³⁰ See Private Operational-Fixed Microwave Service, Multipoint Distribution Service, Multichannel Multipoint Distribution Service, Instructional Television Fixed Service, and Cable Television Relay Service, 6 FCC Rcd 6764, 6773-74 (1991), recon. pending.

³¹ Id. at 6774.

³² See Parts 1, 2 and 21 of the Commission's Rules Governing the Use of Frequencies in the 2.1 and 2.5 GHz Bands, 8 FCC Rcd 1444 (1993), recon. pending.

³³ Instructional Television Fixed Service, 8 FCC Rcd 2828 (1993).

³⁴ Instructional Television Fixed Service, 8 FCC Rcd 1275 (1993).

24. We seek information from commenters on the status of competition from wireless cable operators, and the reasons for this level of competition. If such information is not readily available, we ask that commenters propose the appropriate means for obtaining such information. Specifically, we would like commenters to address the following questions:

(a) How many wireless cable systems currently exist and are providing service to subscribers? Where are these wireless systems located? How many compete with cable systems?

(b) How many subscribers does each wireless operator serve? What is the total estimated subscriber base for each operator? What is the basis for this estimate? How is each wireless system marketed to subscribers?

(c) In areas of competition between wireless and cable systems, what is the approximate market share of each operator? On what is this estimate based? What is the penetration of each wireless operator and each competing cable operator?³⁵

(d) How many wireless systems are currently under development, and what is the projected date for initiation of service for each? How many of these developing wireless systems will directly compete with cable systems?

(e) What percentage of the service area of the developing wireless system and what percentage of the service area of the competing system will constitute the area of overlap? How many potential subscribers live within the overlap area? What is the basis for this estimate?

(f) What is the projected subscriber level for each system within one year of initiation of service? Within three years? What is the basis for this projection?

(g) What is the channel capacity of each existing and projected wireless system? What is the channel capacity of each competing cable system?

(h) How long is it likely to take for wireless cable to serve as a competitive alternative to cable? On what facts is this projection based?

³⁵ By "penetration," we mean the actual number of subscribers as a percentage of the total number of potential subscribers. Commenters are requested to include separate figures for total penetration, and penetration within the area of overlap.

(i) What impediments are there to the development of wireless cable as a competitive alternative to cable?

25. We seek comment on how the prices charged to consumers for subscriptions to wireless systems compare to prices charged by cable systems, both in general and specifically where there is competition between cable operators and wireless operators. We seek suggestions as to how the Commission can gather reliable information about consumer expenditures on cable television provided by cable systems and by wireless systems. Moreover, we seek comment on the relevance of such information to our competitive analysis.

2) Local Multipoint Distribution Service (LMDS)

26. Since the 1990 Report, another delivery system for multichannel video programming has been developed. In 1991, the Commission authorized the Suite 12 Group to provide multichannel video service in New York City using millimeter wave technology.³⁶ After granting this authorization, the Commission received over 900 applications accompanied by petitions for waivers from entities seeking to provide similar service. The Commission decided to institute a formal rulemaking proceeding to determine whether the 27.5 - 29.5 GHz band ("28 GHz band") should be redesignated from terrestrial point-to-point services to terrestrial point-to-multipoint services in order to accommodate multichannel video service, among other proposed uses.³⁷

27. Comments received in response to the Notice of Proposed Rulemaking in this docket indicated widespread interest in point-to-multipoint use of the 28 GHz band for multichannel video service as well as two-way voice and data services. However, several satellite entities argued that use of the 28 GHz band by LMDS operations would cause interference with fixed satellite service. Because of the Commission's desire to accommodate all potential users of this frequency band, and because of the highly technical coordination issues involved with the proposed 28 GHz services, the Commission proposed that a negotiated rulemaking be conducted for the purpose of negotiating proposed regulations to

³⁶ Hye Crest Management, Inc., 6 FCC Rcd 332 (1991). The 27.5 - 29.5 GHz frequency band is allocated for point-to-point microwave radio common carrier service. The 28 GHz band is also allocated on a co-primary basis to fixed satellite services.

³⁷ See Rulemaking to Amend Part 1 and Part 21 of the Commission's Rules to Redesignate the 27.5 - 29.5 Frequency Band and to Establish Rules and Policies for Local Multipoint Distribution Service, 8 FCC Rcd 557 (1993), recon. pending.

govern this band.³⁸ Based on the commenters' support, the Commission has requested General Services Administration ("GSA") approval to establish a negotiated rulemaking. If approved, the parties to the negotiated rulemaking will be charged with proposing technical rules which permit sharing of the 28 GHz band. If it is determined that sharing is not possible, the Commission has stated that it will seek to develop a record to ascertain the economic growth potential of the different proposals, and to identify specific public interest concerns on which it can base its selection from among the competing proposals.

28. If the Commission ultimately concludes that the 28 GHz band may be used for LMDS, we will include LMDS in our report to Congress. However, even if the 28 GHz proceeding is not resolved prior to our report deadline, we nevertheless invite commenters to discuss the appropriate means of addressing LMDS as a potential competitor to cable in our report to Congress.

B. Direct-to Home Satellite Services

1) Direct Broadcast Satellite (DBS)

29. In our 1990 Report, the Commission estimated that DBS would begin service in three to five years. However, in late 1990, Primestar Partners ("Primestar") began offering service using an existing medium-power satellite to provide video programming. Primestar currently provides 10 channels of analog service to approximately 70,000 customers, and it expects to offer more than 70 channels when its subscribers' current receivers are replaced with digital decompression boxes.³⁹ Primestar expects its expanded service to be available by late summer 1994. Primestar's subscribers must use a receiving dish which is approximately 36 to 40 inches in diameter. While Primestar does not charge for the receiving dish, customers pay \$100-200 for installation.

30. The arrival of high-power DBS appears imminent. General Motors/Hughes (operating as DirecTV) launched a satellite in December 1993 and expects service to begin in May or June 1994. Five of the 16 transponders on the satellite are leased to United States Satellite Broadcasting (USSB) while the remaining 11 transponders belong to DirecTV. When DirecTV launches its

³⁸ Rulemaking to Amend Part 1 and Part 21 of the Commission's Rules to Redesignate the 27.5 - 29.5 Frequency Band and to Establish Rules and Policies for Local Multipoint Distribution Service, 9 FCC Rcd 1394 (1994).

³⁹ Rich Brown, "Dishing Up Full-Power DBS," Broadcasting & Cable, Mar. 28, 1994, at 48.

second satellite (scheduled for September 1994), it expects to offer 150 channels of digitally compressed video programming, which includes approximately 40 channels of pay-per-view movies and 30 channels of pay-per-view sports. USSB will offer 20 channels of digitally compressed programming on its five transponders, and also expects to begin transmitting in May or June 1994. Subscribers to high-power DBS service will use a receiving dish which is 18 inches in diameter, and will initially retail for \$699 (plus \$100-\$200 for installation). There are seven other entities that have received construction permits from the Commission.⁴⁰ Commission rules require these permittees to make their systems operational within six years of receiving a conditional construction permit.⁴¹ The operational deadlines for these seven permittees occur between mid-1995 and mid-1998.

31. We seek information from commenters on the status of competition from both medium-power and high-power DBS services, and on the reasons for this level of competition. To the extent that information is not readily available, we ask commenters to propose the appropriate means of obtaining such information. Specifically, we would like commenters to address the following questions:

With respect to medium-power DBS service:

- (a) Is the 70,000 subscriber figure current, and where are these subscribers located?
- (b) How many subscribers are located in areas served by cable operators? What factors account for cable subscribers' choice to receive DBS?
- (c) What is the total estimated potential subscriber base and the basis for this estimate? What is the projected subscriber level within one year, within three years, and what is the basis for these projections?
- (d) What is the total estimated channel capacity of the service?
- (e) Is the current installation charge an impediment to attracting subscribers? How do the prices charged for this service compare with the prices charged for cable service?

⁴⁰ These parties are Advanced Communications Corp., Continental Satellite Corp., Direct Broadcasting Satellite Corp., Directsat Corp., Echostar Satellite Corp., Tempo Satellite, Inc., and Dominion Video Satellite, Inc.

⁴¹ 47 C.F.R. § 100.19(b).

(f) Are the prices nationally uniform, or do they vary depending on the location of the subscriber? If they vary, what are the reasons for the price differentials?

(g) Are any additional companies planning to offer medium-power DBS service? If so, when will any additional service become available to subscribers?

(h) How are the services marketed? Are current marketing efforts targeted equally to potential subscribers in areas served by cable systems as well as to areas unserved by cable systems? If not, why not?

(i) How long is it likely to take for medium-power DBS to serve as a competitive alternative to cable service? What is the basis for this projection?

With respect to high-power DBS service:

(a) What is the total estimated subscriber base for each operator? What is the basis for this estimate?

(b) What is the total estimated channel capacity of each operator? What are the plans of each operator to increase the digital compression ratio from the initial ratio used at the time of launch (so as to offer more channels at a later date)?

(c) How does each operator market its services? Are current marketing efforts targeted equally to potential subscribers in areas served by cable systems as well as to areas unserved by cable systems? If not, why not?

(d) What is the projected subscriber level for each operator within one year of launch of service? Within three years? What is the basis for these projections?

(e) In what circumstances are multiple decoders required? Is the current cost of installation and equipment an impediment to attracting subscribers?

(f) How will prices charged by each operator for this service compare with the prices charged for cable service?

(g) Are prices nationally uniform, or do they vary depending upon the location of the subscriber? If they vary, what are the reasons for the pricing differentials?

(h) How long is it likely to take for this service to serve as a competitive alternative to cable? What is the basis for this projection?

2) Home Satellite Dishes (HSDs)

32. In the 1990 Report, the Commission observed that Home Satellite Dish ("HSD") use in the United States had grown from approximately 900,000 units in 1984 to roughly 2.8 million units at the time of the Report.⁴² The 1990 Report observed that the growth of HSD sales stalled in 1986 upon the advent of satellite signal scrambling. Prior to scrambling, HSD sales had reached a rate of almost 750,000 per year, growing five-fold in a three year period.⁴³ Moreover, the 1990 Report noted that the Satellite Broadcasting and Communications Association of America ("SBCA") had advised the Commission that HSDs would provide an effective alternative to cable service because more programming is available to HSD users than to cable subscribers.⁴⁴

33. The 1990 Report noted, however, that HSD service is considerably more expensive for subscribers than cable service, and also requires reception equipment costing \$2,000 - \$3,000.⁴⁵ In addition to the high cost of HSD reception equipment, the report noted that zoning regulations or physical limitations could so restrict many viewers that they would be unable to install HSDs at any price.

34. We seek information from commenters on the status of, and reasons for, competition from HSD service providers. To the extent that such information is not readily available, we ask that commenters propose the appropriate means for obtaining such information. Specifically, we would like commenters to address the following questions:

- (a) What is the current number of installed HSDs, and how are HSD services marketed to subscribers? How many channels of programming are available to HSD users?
- (b) Where are these HSD users located? How many HSD users live within an area served by a cable system?
- (c) How have costs for HSD receivers changed? Do such costs provide a barrier to subscriber use of HSDs?

⁴² See 1990 Report at 5016-5017. For purposes of clarity, DBS customers, who will also use satellite dishes for reception, are not to be included in discussions or information related to such HSD users. See Section III(B)(1), supra.

⁴³ Id.

⁴⁴ Id. at 5016, n. 149.

⁴⁵ Id. at 5017, n. 150.

(d) Have any changes in the physical size of the HSD receivers had an impact on their cost to subscribers? Has the fact that HSD receivers are now smaller in size had any effect on subscriber demand?

(e) What is the projected growth of HSD use in the next year? Three years? What is the basis for this projection?

35. In addition, we seek comment on how the prices charged to HSD users for programming compare to prices charged by cable systems. How can the Commission gather reliable information pertaining to consumer expenditures on video programming provided by cable systems and by HSD users? Moreover, how relevant is such information to our competitive analysis?

36. Finally, to what extent are local zoning or other local regulations an impediment to the development or expansion of HSDs? Is the Commission's limited preemption of such local rules adequate to encourage expansion of HSD use?⁴⁶

C. Satellite Master Antenna Television Systems (SMATV)

37. In 1989, the Commission determined that SMATV operators collectively served about a half million subscribers, down from a high of one million in 1987.⁴⁷ Further, we noted that the National Private Cable Association ("NPCA") claimed a potential market for SMATV operators of 17 to 22 million subscribers.⁴⁸ The 1990 Report indicated that several SMATV operators had informed the Commission that a variety of local regulations and practices had severely restricted their ability to operate and to compete.⁴⁹ SMATV operators also viewed the Commission's definition of a "cable system" as a regulatory impediment to SMATV service because it restricts their ability to expand their service beyond commonly-owned facilities separated by a public right-of-way.

⁴⁶ See 47 C.F.R. § 25.104, which preempts state and local zoning or other regulations that unreasonably differentiate between satellite receive-only antennas and other types of antenna facilities. See also Town of Deerfield v. FCC, 992 F.2d 420 (2d Cir. 1993) (holding that Commission cannot require parties to exhaust judicial remedies before seeking administrative relief). The Commission also has pending a petition for declaratory ruling from SBCA, filed April 16, 1991, seeking to clarify areas of uncertainty under § 25.104.

⁴⁷ See 1990 Report at 5018-5019.

⁴⁸ Id.

⁴⁹ Id. at 5019.

38. In 1990, the Commission concluded that the "cable system" definition appropriately encompassed video distribution systems utilizing wires physically installed in public rights of way.⁵⁰ With respect to distributors that make no use of public rights of way, the Commission excluded from the definition all distributors employing wireless transmissions (such as MMDS and DBS), as well as those systems employing wired transmissions that served a single multi-unit dwelling or dwellings under common ownership, control or management.⁵¹ SMATV systems connecting separately owned multi-unit dwellings by wire, however, were deemed "cable systems."⁵²

39. We seek information from commenters on the status of, and reasons for, competition to cable operators provided by SMATV systems. To the extent that such information is not readily available, we ask that commenters propose the appropriate means for obtaining such information. Specifically, we would like commenters to address the following questions:

- (a) How many SMATV systems currently exist and are providing service to subscribers? Where are these SMATV systems located? How many compete with cable systems?
- (b) How many subscribers does each system serve? What is the total estimated subscriber base for each SMATV operator? How are SMATV services marketed to subscribers?
- (c) In areas of competition between SMATV systems and cable systems, what is the approximate market share of each operator? On what is this estimate based? What is the penetration of each SMATV operator and each competing cable

⁵⁰ See Definition of a Cable Television System, 5 FCC Rcd 7638 (1990).

⁵¹ Id.

⁵² In FCC v. Beach Communications, Inc., 113 S. Ct. 2096 (1993), the Supreme Court found a sufficient rational basis under the Constitution's Equal Protection Clause for the 1984 Cable Act's distinction between SMATV systems that serve separately owned or co-owned multi-unit buildings, but remanded the case with respect to the appropriate standard of review. On remand, the D.C. Circuit dismissed the petition, determining that there was no basis for application of a heightened scrutiny standard. Beach Communications, Inc. v. FCC, No. 91-1089 (D.C. Cir.) (Oct. 22, 1993).

operator?⁵³

(d) What is the channel capacity of each existing and projected SMATV system? What is the existing and projected future channel capacity of any competing cable system?

(e) How many SMATV systems are currently under development, and what is the projected date for initiation of service? What is the projected subscriber level for each developing system within one year, and three years, of initiation of service? What is the basis for this projection? How many of these developing SMATV systems will compete with cable systems?

40. In addition, we seek comment on how the prices charged to consumers for subscriptions to SMATV systems compare to prices charged by cable systems, both in general and specifically where there is competition between cable and SMATV operators. How can the Commission gather reliable information pertaining to consumer expenditures on cable television and on services provided by SMATV systems? Moreover, we seek comment on the relevance of such information to our competitive analysis.

D. Local Exchange Carriers (LECs)

41. In the 1990 Report, we did not include local telephone exchange carrier participation in the multichannel video marketplace in our analysis of competition, concluding that such participation was unlikely to occur in the near term.⁵⁴ Within the past four years, however, significant changes have occurred which warrant inclusion of LECs in our analysis of competition in the multichannel video marketplace.

42. LECs currently are statutorily prohibited from providing video programming directly to subscribers within their service areas.⁵⁵ However, in July 1992, the Commission adopted rules authorizing LECs to offer video dialtone service, which permits LECs to participate in the video marketplace consistent

⁵³ With respect to penetration, commenters are requested to include separate figures for total penetration, and penetration within the area of overlap. See n. 35 for definition of penetration.

⁵⁴ See 1990 Report at 5019.

⁵⁵ Communications Act, § 613(b); 47 U.S.C. § 533(b).

with the statutory prohibition.⁵⁶ Pursuant to this authorization, a LEC may provide the transmission path for video programming on a common carrier basis, while an unaffiliated entity supplies the programming.

43. Since adoption of the video dialtone framework, we have granted applications by different LECs for technical and market trials of video dialtone in several markets.⁵⁷ Several LECs also have filed applications for permanent commercial video dialtone service. In addition, Congress is considering legislation to repeal the telephone company-cable cross-ownership restriction,⁵⁸ and several LECs have challenged the constitutionality of the restriction in federal district courts throughout the United States.⁵⁹

44. We recognize that many aspects of the video dialtone policy as expressed in both the First and Second Report and Order are challenged in reconsideration petitions and appeals. In addressing video dialtone in this NOI, we do not open any of the issues raised in CC Docket No. 87-266. We merely request information regarding video dialtone which will aid in the development of a report on competition in the multichannel video marketplace. We will not consider comments that argue the merits of matters currently on reconsideration in the video dialtone docket. We also are not consolidating this NOI with any aspect of the video dialtone proceeding.

45. We recognize that the outcome of this NOI and our

⁵⁶ Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54 - 63.58, 7 FCC Rcd 5781 (1992), recon. pending, appeal pending sub nom., Mankato Citizens Telephone Company v. FCC, D.C. Cir. No. 92-1404.

⁵⁷ See, e.g., Chesapeake and Potomac Telephone Company of Virginia, 8 FCC Rcd 2313 (1993); New York Telephone Co., 8 FCC Rcd 4325; U.S. West Communications, Inc., 9 FCC Rcd 184 (1993); Southern New England Telephone Co., FCC 93-473, November 12, 1993; Rochester Telephone Co., DA 94-275, March 25, 1994.

⁵⁸ H.R. 3636, 103rd Cong., 1st Sess., 139 Cong. Rec. E-3114 (1993) and S. 1822, 103rd Cong., 2nd Sess., 140 Cong. Rec. 771-788 (1994).

⁵⁹ In Chesapeake and Potomac Tel. Co. v. U.S., 830 F. Supp. 909 (E.D. Va. 1993), Amended Final Order, Civ. No. 92-1751-1 (Oct. 7, 1993), appeal docketed, Nos. 93-2340 and 93-2341 (4th Cir. Oct. 15, 1993), the court held Section 533(b) of the Communications Act unconstitutional as applied to Bell Atlantic within its service area.

report on the status of competition provided by video dialtone in the multichannel video marketplace may be affected by matters currently pending before the Commission, the courts and Congress. Consequently, we seek comment upon how we should approach and address video dialtone in the context of our report on competition. For example, commenters are asked to address the following questions:

- (a) Should we seek competitive analysis information from the LECs conducting video dialtone market and technical trials? To what extent is such data proprietary or confidential?
- (b) Are numbers of subscribers to a basic platform relevant to our inquiry? What other information, if any, pertaining to subscribers would aid our understanding of the competitive impact of video dialtone?
- (c) Should non-video and other programming services with a video component (e.g., data, text, informational) provided over the video dialtone platform be included in our analysis, or should we focus solely on video programming offerings?
- (d) What type of information pertaining to program suppliers should we examine?
- (e) What is the appropriate means of comparing prices charged to subscribers for video dialtone and video programming services to prices charged to subscribers for cable? What information do we need to solicit to make such a comparison and is such a comparison feasible?

46. Because video dialtone is a nascent service, we believe it premature at this juncture to seek specific subscription data. However, we invite commenters to address the following issues with respect to the development of direct competition from video dialtone providers:

- (a) Has the adoption of the Commission's video dialtone policy affected the development of new programming sources? How long is it likely to take for video dialtone to serve as a competitive alternative to cable?
- (b) If traditional telephone technology (twisted pair copper wiring) is utilized to deploy broadband services, is it feasible for video dialtone to serve as a competitive alternative to cable?
- (c) When will technologies such as digital compression and broadband switching be readily available in the market?

E. Cable Overbuilds

47. In the context of adopting rate regulation rules and policies pursuant to the 1992 Cable Act,⁶⁰ we note that the Commission sought to design an appropriate rate regulation mechanism that would require noncompetitive systems to set rates at reasonable levels. To do this, the Commission conducted a "Competitive Survey" by selecting a random sample of cable systems from which it sought information concerning current prices, past prices, and system characteristics.⁶¹ The sample of cable systems included, among other systems, those that face actual competition from at least one other multichannel video service provider ("overbuilds"). For purposes of the Competitive Survey, the Commission identified forty-six cable systems that met the definition of an overbuild system.⁶²

48. We seek further and more comprehensive information on overbuilds; specifically, on the status of competition from cable overbuilds and the reasons for any change in the status of cable overbuilds since both the 1992 Competitive Survey and our 1990 Report. To the extent that information is not readily available, we ask that commenters propose the appropriate means for obtaining such information. More specifically:

- (a) How many cable operators face competition from cable overbuilds? How does each cable overbuild market its services to subscribers?
- (b) Where are the cable overbuilds located? How many subscribers are served by each incumbent system facing such competition? How many subscribers are served by each cable overbuild?
- (c) What percentage of the area served by each cable overbuild and what percentage of the area served by each incumbent cable system constitutes the area of overlap?
- (d) How many potential subscribers live in the area of overlap? What is the penetration of each cable overbuild, and the penetration of each incumbent cable system, both in total service areas and in areas of overlap?

⁶⁰ See, e.g., Rate Order, supra.

⁶¹ On December 10, 1992, the Commission adopted an Order, in MM Docket No. 92-266, 8 FCC Rcd 226, which required certain selected cable system operators to provide subscriber rates and other information for their cable community units and the cable systems to which they belong.

⁶² See Appendix E of Rate Order, supra.

(e) How many cable overbuilds are currently authorized and unbuilt? Why are they unbuilt?

(f) What is the potential subscriber base for each cable overbuild currently under construction? What is each overbuild's projected subscriber level within one year of initiation of service? Within three years? What is the basis for this projection?

(g) What is the channel capacity of each existing and unbuilt cable overbuild? What is the present and projected future channel capacity of each competing incumbent system?

49. Pursuant to the 1992 Cable Act, a franchising authority may not grant an exclusive franchise or unreasonably refuse to award an additional competitive franchise.⁶³ We request comment on the following questions regarding the relationship between exclusive franchises and overbuilds:

(a) What has been the effect of the statutory prohibition against exclusive franchises? Has this encouraged entry by overbuilds?

(b) Is there a relevant distinction between a municipal cable system and an independent overbuild system?

(c) What technical or economic barriers make it difficult for an overbuild system to enter a local cable market? To what extent does the local cable franchising process work to the disadvantage of an overbuild system, notwithstanding the provisions of the 1992 Cable Act?

(d) What cost disadvantage or advantages does the overbuild system experience on entering a local cable market currently served by an existing cable system? If a cost disadvantage does exist, to what extent is it attributable to local franchising requirements, federal regulations, securing rights-of-way, or other legal or policy factors?

(e) What sales or marketing disadvantage does the overbuild system experience on entering a local cable market currently served by an existing cable system? If such disadvantages exist, how are they overcome? How long, in general, does it take to overcome such disadvantages?

F. Over-the-air Television Broadcast Service

50. Conventional over-the-air television broadcasting, depending on the particular geographic and other circumstances

⁶³ See 1992 Cable Act, § 7(a)(1), 47 U.S.C. § 541(a)(1).

involved, exists as a competitor to cable service, as a supplier of programming for cable system distribution, or both. While we have concluded in our recent proceedings that over-the-air broadcasting is not, by itself, an "effective competitor" to the full range of regulated basic and cable programming service offerings,⁶⁴ we have not discounted the existence of broadcasting service, in combination with other video delivery systems, as contributing toward competition in the video distribution market. A significant proportion of the public continues to rely on over-the-air service exclusively as its source of television programming, and over-the-air stations distributed by cable continue to garner a majority of the viewing time of cable subscribers. Thus, we believe that the contribution of the over-the-air television service to the development of effective competition to cable service warrants inclusion in our analysis.

51. For purposes of this NOI, we seek information regarding how changes in the video marketplace are affecting the competitive relationship between cable operators and terrestrial broadcasters. We also seek comment on the degree to which broadcasting service, particularly in conjunction with multichannel distribution services, exerts a constraining influence on the market power of cable systems. Further, as we noted in the Rate Order,⁶⁵ traditional broadcasters may at some point, through the development of digital television compression technologies, be in a position to compete with cable systems as "multichannel" video providers through the multiplexing of several video programs on a single video channel. Digital transmission systems may also make it possible to correct a number of the reception defects, such as "ghosting" or noise, associated with conventional broadcasting. Thus, commenters are asked to provide information that will assist us in projecting how these developments will influence the competitive relationships involved.

G. Technological Advances

52. We would like commenters to address significant technological advances in the multichannel video programming arena that they believe will have a significant impact on the marketplace. For example, at what point will technologies with compression capabilities become a competitive factor in the marketplace? We seek comment on the competitive effects that compression technology may have on video distribution technologies. Specifically, what will be the effect of digitally compressed services, such as expanded programming options, multiplexed pay networks, digital stereo and near video-on-demand

⁶⁴ See, e.g., Rate Order, 8 FCC Rcd at 5652-5653.

⁶⁵ 8 FCC Rcd 5631, 5652-53 (1993).

movies, on the marketplace?⁶⁶ What will be the competitive effects of advances in encryption technology on the provision of subscription services? What competitive effects will advanced television (ATV) and interactive services have on the video distribution marketplace?

53. We also ask commenters to identify other emerging potential providers of video programming, such as electric or other utility companies. What are the implications of the entry of such distributors on competition in the video programming marketplace?

54. In addition, we request comment on the implications for the widespread availability of video services that may arise from the combination of ongoing technological developments and existing Commission regulations. What are the implications of these technological changes for the provision of locally-produced or originated programming as compared to nationally-produced services?

IV. Trends in Horizontal Concentration and Vertical Integration in the Multichannel Video Programming Marketplace

55. In the 1992 Cable Act, Congress mandated the establishment of limits on the number of channels on a cable system that can be occupied by a video programming vendor in which a cable operator has an attributable interest, and on the number of cable subscribers a person is authorized to reach through cable systems owned by such person or in which such person has an attributable interest.⁶⁷ Congress further addressed the appropriateness of imposing limitations on the degree to which multichannel video programming distributors may create or produce video programming.⁶⁸

56. In order to establish the ownership and channel occupancy limits mandated by Section 11 of the 1992 Cable Act, Congress directed the Commission to:

- (a) ensure that no cable operator or group of cable operators can unfairly impede the flow of video programming from the programmer to the consumer;

⁶⁶ See Tom Kerver, "Riding on the 'Headend in the Sky,'" Cablevision, March 14, 1994, p. 38.

⁶⁷ See 1992 Cable Act, § 11(c); 47 U.S.C. § 533(f)(1); Communications Act, § 613(f)(1).

⁶⁸ See 1992 Cable Act, § 11(c), Communications Act, § 613(f)(1)(C); 47 U.S.C. § 533(f)(1)(C).